BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: DADE BEHRING, INC. 2040 Enterprise Boulevard West Sacramento, CA 95691 Employer	Docket No. 05-R2D1-2203 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board) issues the following decision after ordering reconsideration on its own motion, pursuant to the authority vested in it by the California Labor Code.

JURISDICTION

Dade Behring, Inc. (Employer) operates a place of employment located at 2040 Enterprise Boulevard, West Sacramento, California. On May 5, 2005, the Division of Occupational Safety and Health (Division) cited Employer for allegedly violating section 3314(c) of the occupational safety and health standards and orders contained in California Code of Regulations, Title 8.

Employer timely appealed the citation and a hearing was held before an Administrative Law Judge (ALJ) on December 13, 2006. The ALJ rendered a decision on March 16, 2007, which upheld the citation and the proposed penalty of $22,500.

The Board took reconsideration of this matter on its own motion on April 13, 2007 and extended the parties time to respond to the order until July 17, 2007. On July 17, 2007, both the Division and Employer filed an answer to the Board's order.

ISSUE

Was the Administrative Law Judge's ruling on Employer's motion for non-suit appropriate?

FINDINGS AND REASONS
FOR
DECISION AFTER RECONSIDERATION

The Board has fully reviewed the record in this case pertaining to Employer's motion for non-suit, including the arguments of counsel, the decision of the ALJ, and the arguments and authorities presented in the parties' answers to the order of reconsideration. In light of all of the foregoing, we find that the ALJ's decision to deny the motion for non-suit was proper in this case. We adopt the portion of the attached ALJ's decision that addresses Employer's motion, stated on pages 10-14, in its entirety and incorporate it into our decision by this reference.

To the extent that the ALJ's decision could be read to state that a motion for non-suit would never be proper in a proceeding before the Board, we find that the decision does not assert or support this conclusion. We believe that a situation could arise in which a motion for non-suit would be properly granted in an appeal proceeding before the Board consistent with the principles established in *Duarte & Witting, Inc. v. New Motor Vehicle Board* (2002) 104 Cal. App. 4th 626, 128 Cal. Rptr. 2d 501. Nonetheless, this remains an open question of law that we do not now address because the case before us does not present facts that would allow us to rule on this issue.

DECISION AFTER RECONSIDERATION

The ALJ's decision denying Employer's motion for non-suit is affirmed. The violation of section 3314(c) is upheld and the civil penalty of $22,500 is assessed.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: December 30, 2008

BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of:

DADE BEHRING
2040 Enterprise Boulevard
West Sacramento, CA 95691

Employer

DOCKET 05-R2D1-2203

DECISION

Background and Jurisdictional Information

On February 11, 2005, the Division of Occupational Safety and Health (the Division) through Cal/OSHA Associate Safety Engineer John Stamatellos conducted an inspection at a place of employment maintained by Employer at 2040 Enterprise Boulevard, West Sacramento, California (the site). On May 5, 2005, the Division cited Employer for an alleged serious, accident-related violation of §3314(c) [failure to control hazardous energy of rotary machine] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations,[1] and proposed a civil penalty of $22,500.

Employer timely appealed the existence of the alleged violation. Employer also raised affirmative defenses alleging that the machine was equipped with emergency stop buttons and air dump valves, and all pinch point hazard signs are placed near hazardous areas of machine, and employees are trained on the use of the safety devices.

Employer moved to add the independent employee act defense as an affirmative defense. On January 12, 2006, a Board Administrative Law Judge granted the motion adding the independent employee act defense to its appeal.

This matter came on regularly for hearing before Robert N. Villalovos, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Sacramento, California on December 13, 2006. Employer was represented by Gayle M. Athanacio, Attorney, of Sonnenschein, Nath & Rosenthal, LLP. The Division was represented by William Estakhri, District Manager. Oral and documentary evidence was presented by the parties and the

[1] Unless otherwise specified, all section references are to Title 8, Cal. Code of Regulations.

matter was submitted on December 13, 2006. The undersigned ultimately extended the submission date to February 13, 2007.

Summary of Evidence

Yaroslav Zakharnev (Zakharnev) testified for the Division that he was employed permanently with Employer since December 1996. When he was hired, he was employed as a Production Assistant and operated a washer punching machine. After two years, he was promoted to a Machine Operator for an inoculator machine and was a Senior Machine Operator for more than two years prior to quitting in November 2006.

Zakharnev stated that, as a senior machine operator, he was responsible for knowing the inoculcator machine, how to fix it, load parts, and conduct preventive maintenance. He performed scheduled weekly, monthly and yearly maintenance procedures, which included greasing the machine, replacing used parts, and generally making sure it ran well. Zakharnev stated that, when performing preventive maintenance, he checked for guarding and if a guard was missing, he was responsible for putting it back on. He stated that he would check everything on the machine and asserted that "if anything is wrong, we address it." Zakharnev stated that the machine operator had authority to stop the operation of the machine and to instruct a production associate to stop the machine as well. He stated that a production assistant, on the other hand, conducted the final inspection of the product and was not responsible for doing preventive maintenance on the machine.

Referring to photographs of the machine he worked on when he was injured on January 31, 2005 (Exhibits 3 and 4), Zakharnev testified that the machine rotates every 6 seconds during its operation. On the main (circular) rotary table, four nesting trays hold plastic pipettes (each pipette will be an inoculator as a final product) and move or rotate to approximately 9 stations where specific actions are taken. The table moves automatically every 6 seconds in a clockwise direction using an electrically powered motor. During the 6 second interval when the table is not moving the machine is performing specific operations at various stations. The operation first involves loading a vacuum cover. Next washers are placed with the vacuum cover and a station checks for holes. The pipettes are then loaded inside the vacuum cover and are checked to confirm they are loaded. The pipettes then go to a welder where they are welded to the vacuum cover. Another station performs an air test for leaks in the pipettes, then are forwarded to the cutter station where the tips of the pipettes are cut with a straight knife after they are raised by a pedestal. Following the cutting, the pipettes rotate to the ejector station where they are ejected from the machine onto a conveyor. The pipettes undergo a final inspection for visual defects when they are on the conveyor and then get bagged.

According to Zakharnev, there are two machines in the department with two machine operators and 3 production associates for each machine.

Zakharnev testified that, as a senior machine operator, he considered himself an expert on how the machine operated. During its operation, he would not stand in a particular location and often moved from station to station and also loaded vacuum covers, washers and pipettes.

Zakharnev stated that there were regular and continuous problems with the nesting trays at least once a day and sometimes a lot more often. A plastic part can jam at certain places in the operation and could occur at any station. According to Zakharnev, it was his duty to seek and fix any problem. Sometimes he would have to call the maintenance department for help. As a daily issue, however, Zakharnev would undertake to determine and fix any jamming problem. Many problems cannot be permanently fixed because so many fine adjustments are involved and jams are affected by numerous factors such as temperature, weld timing, and weld current. Zakharnev stated that the wearing of parts could also cause jams that require changes in settings. The machine operates 24 hours a day during weekdays.

Zakharnev stated that, on the day of the accident, he started the morning shift at 6:00 a.m. and performed the start-up the machine for the first time because it was a Monday and the machine was previously turned off. The start-up takes approximately 15-30 minutes before its ready for full production. When he started the operation that morning, the machine would jam—not every cycle but it was jamming very often. Specifically, a jam was occurring on cavity #1 in the nests which he marked on Exhibit 3, as it was going into the cutter station (after leaving the adjacent air test station). A part in cavity #1 would not seat properly so that it jammed when it went into the cutter station. The cutter station had a pedestal which moved up and down. When it moved upwards, a straight knife cut the tips of the pipettes. The pedestal was actuated by and electrical signal and moved upwards pneumatically.

According to Zakharnev, he was standing at the air test station and needed to have the machine running. He looked at the main welder (the previous station to the air test station) and put his left hand under the rotary table at the air test station with his thumb sticking out toward the cutter station to his left, and was tapping the nest using his four fingers. Zakharnev stated he was not paying attention and his hand moved and his left thumb was caught between the (moving) pedestal and the rotary table at the cutter station. He stopped the machine. Zakharnev stated that, at the time, he was trying to diagnose the problem in order to prevent a jam and was adjusting or straightening placement of the inoculator nest. The nest was jamming when it went into the cutter station. He stated that this type of jamming problem that occurred in this instance has occurred both before and after the accident in this case.

Referring to the photograph of the air test station in Exhibit 4, Zakharnev identified the rotary table and pedestal of the cutter station to the left of the air test station and the location of his hand at the time of the

accident. He stated that the vertical guard in the photograph which closed the opening between the two stations was not installed when the accident occurred.

According to Zakharnev, Employer's emergency team responded and called paramedics who transported him to the hospital. He was hospitalized until 1:00 a.m., the next day (February 1, 2005) He lost the tip of his thumb (1/2 inch) which included bone loss.

Zakharnev acknowledged that extension tools were available for use and could be used in cases to clear jams in areas not accessible by hand. Zakharnev stated that, in the morning of the accident, he removed plastic parts at the cutter station and stopped the machine to use the extension tool. He stopped the machine using the machine's stop button when a 6 second-cycle was complete. Sometimes the machine would not stop until it completed the next cycle. Zakharnev stated that there was an emergency "dead-man" switch which he would usually use to stop the machine at the end of the immediate cycle. Zakharnev stated that there were 4 emergency buttons located at points on the machine and 3 regular stop/start buttons located around the machine. On cross-examination, Zakharnev sated that while the dead-man switches were designed to immediately stop the machine, he would wait until the end of a cycle because other procedures would be required if he stopped the machine in mid-cycle.

Zakharnev stated that jams were not serious problems on the machine but they slowed down the process. It was common knowledge among his colleagues that the machine jams.

During cross-examination, Zakharnev acknowledged that employees who were production associates were not under his supervision and they did separate work from his operation of the machine. The production associates worked on the final product. When asked about the frequency and nature of jams, Zakharnev stated that he tended to see the same jamming issues occurring and some were routine.

Zakharnev acknowledged that Employer had a "15 minute Rule" that if a problem is not fixed within a 15 minute period, the maintenance department would be called. He recognized that after 15 minutes he was supposed to call maintenance and stated that he would take care of the more minor maintenance. He stated that, personally, he liked to find the problem and if he was able to fix it, he would; but if not, he would call maintenance. Zakharnev admitted that jams were a well-known occurrence for the machine and that an operator was assigned there because of it. Due to the many parts and procedures involved, senior machine operators were very competent and knowledgeable of the machine.

Zakharnev also stated that Employer took safety seriously and conducted weekly and monthly safety meetings. In monthly safety meetings, he

periodically reviewed Employer's safety policies and procedures. He received special training which included review of operating manuals which were for the most experienced machine operators. He was provided an extension tool described as a large screwdriver type tool and was trained how to use it. He could have used it to accomplish the task he was performing when the accident happened. Zakharnev stated he was also provided other tools to assist in operation of machine. Zakharnev recalled he was also trained by maintenance personnel. In addition to frequent safety meetings for the inoculator machine, Employer also provided meetings in environmental safety and health issues.

Zakharnev stated he was trained by Joe Durst, Senior Machine Operator, and he received mostly hands on training. There were no tests to determine what was learned during training. On cross-examination, Zakharnev further acknowledged he received training from Keith Roderick, an engineer, and Tim Wilson, from the Safety Department. The training covered Zakharnev's job duties, maintenance, maintenance and safety.

Zakharnev also acknowledged that Robin Pulio (Pulio), his supervisor, made safety important. He also stated he received a final warning for the subject incident after putting his hand in harm's way while the machine was operating and admitted that he violated the company's policies. He recalled receiving four disciplinary sanctions but could only recall the reasons for three of them which included failing to wear safety shoes, the incident in this case, and a prior incident for "slaking" (taking long breaks). In each case, he received a written warning and would not get a yearly pay raise. He recalled that because of the last incident, he received a lesser raise than what he would have normally received.

John Stamatellos (Stamatellos) testified for the Division that he has been employed by the Division as an Associate Safety Engineer for 7½ years and his experience in safety in various positions goes back to at least 1983. Stamatellos stated that Employer reported the injury of Zakharnev to the Division on the date of the accident. On the written report, Employer described the incident as an employee who reached into a rotary machine without de-energizing it. (Exhibit 5) Stamatellos stated he was assigned to investigate the accident on February 7, 2005.

Stamatellos went to the site on February 11, 2005 and held an opening conference with Mr. Batakji (Batakji) who was Employer's Vice president of Operations, Human Resources Manager, and Employer's Biologic Manager. He was taken to the accident site and told what occurred by Batakji. He took a photograph of the machine (Exhibit 3). Stamatellos stated he requested Employer's accident report which was subsequently sent by Batakji to the Division. (Exhibit 6) On cross-examination, when asked whether he agreed with Employer's findings in the report, Stamatellos stated that he did and also agreed with Employer's corrective measures. Stamatellos further conceded that there is no mention in Employer's findings that Zakharnev was clearing a jam

at the time; however, he indicated that the section of the report describing the incident referred to a jam in the machine.

Stamatellos stated he spoke with Batakji once in person and several times over the phone. Over a hearsay objection, Stamatellos stated that Batakji mentioned that the accident occurred because the machine jammed.

Stamatellos stated that there was an inconsistency in Zakharnev's testimony at the hearing and what he learned during his investigation in that, at the hearing, Zakharnev stated he reached under to adjust the product (seated in the tray); however, Zakharnev previously told Stamatellos, and Employer's accident report stated, that he was unjamming a piece of plastic. However, on cross-examination, Stamatellos stated he could not recall if Zakharnev specifically said there was a jam of the machine, and further acknowledged that Zakharnev probably had a better recollection of what occurred since he was the one present at the time of the accident.

Stamatellos referred to the requirements in §3314(c) as providing "lock-out tag-out" procedures. According to Stamatellos, the required procedure necessitates that the machine be stopped and the power source de-energized. For the subject machine, both electrical and pneumatic power sources must be addressed. Stamatellos stated that, when servicing or clearing a jam on an energized machine, it is not enough that the machine be shut down using the emergency switch since it could be activated by someone else. Stamatellos indicated that Employer's emergency shut-off procedure was not compliant because the machine was not locked out. He noted that if the operator shut down the machine, locked the operating points and if no one else could operate the machine except for the machine operator, Employer would be compliant. However, Stamatellos further qualified his statement adding that, if the machine was required to be moving, the use of extension tools would be required under the procedures in the safety order.

Over hearsay and foundation objections, Stamatellos testified that, in addition to de-energizing the machine using the emergency stop button which stops both the electrical and pneumatic systems, locking out the on-off button could not be effective unless a case was placed over it, preventing others from accessing it in order to clear a jam. However, if the machine needed to be moving while performing such operation, extension tools must be used by the employee. Stamatellos stated that lockout-tagout procedures are required for clearing every jam on the inoculator machine.

Stamatellos testified that he issued a citation for violation of §3314(c) because the safety order addresses adjusting and servicing operations which Zakharnev was performing at the time of the accident. Here, the machine was not locked out and tagged out when an employee performed servicing or adjusting of the inoculator machine and he came within a zone of danger which is below the table top where the pedestal (in the cutting station) was operating.

On cross-examination, Stamatellos acknowledged that Batakji did not personally observe the accident. Stamatellos further stated that Zakharnev was the only employee working on the machine and he understood that only machine operators are authorized to operate the machine.

Stamatellos was asked about the exception to §3314(c) allowing for alternative methods for performing minor adjustments and servicing of machines. He stated that the use of extension tools would constitute an alternative means but that an instruction to operators to not place a body part in harm's way would be insufficient, by itself. When asked if he asked Zakharnev if he had locks to implement a lockout of the machine, Stamatellos stated that Zakharnev only said he did not use the "lockout-tagout" procedure. Stamatellos also acknowledged that Employer was not cited for not having a "lockout-tagout" procedure.

Upon the Division resting its case and reserving its right to rebuttal, Employer moved for nonsuit based upon the Division's failure to establish required elements for establishing a violation of §3314(c). Employer's counsel argued that the Division failed to establish, by a preponderance of the evidence, that Employer's employee was clearing a jam. Employer also argued that the Division's evidence showed that the machine must be capable of movement in order to diagnose the problem and prevent a jam. According to Employer, Employer complied with §3314(c)(1) since the machine was required to be moving and Zakharnev established Employer's use of other safety methods (only trained machine operators could operate the machine, extension tools were provided and used). Also, Employer argued that the evidence established that Zahkarnev was performing a minor adjustment of the machine during normal production operations and Employer used alternative measures which provided effective protection, and thus, met the requirements under Exception 1 of the safety order in that extension tools were provided, emergency buttons were placed on the machine, and only trained employees were allowed to operate the machine. The undersigned reserved ruling on the motion and requested Employer to proceed with its case.

Robin Puleo (Puleo), Employer's Manufacturing Manager, testified for Employer. Puleo has been in her position for 8-9 years and was previously a supervisor for 9 years, for total of approximately 18 years with Employer. Her current duties include, recruiting, hiring, employee training, tracking production schedules, drafting monthly reports and performance evaluations for employees, and performing supervisory duties. She is on the Quality Safety Committee which meets bi-weekly and goes over safety issues and plans safety fairs. Puleo stated that she manages senior machine operators for the inoculator machine.

Puleo stated that Employer enforces safety through meetings, monthly trainings, quarterly safety assessments (audits), which includes safety matters regarding the inoculator machine. According to Puleo, Employer is dedicated to safety and makes safety a top priority along with quality. As a manager, it is

important for her to instill safety procedures in employees and to insure that Employer's safety policies and procedures are implemented by employees.

Puleo is personally familiar with the inoculator machine which is known as the Second Generation Inoculator, and knows how it operates. Puleo explained that jams of material frequently occur because of the complexity of the machine which has 8-9 stations, moving parts which are driven electrically and by air pressure. The machine produces approximately 210,000 inoculators per day. There is a regular need to make adjustments due to changes in material or the machine. Puleo stated that, as a practical matter, it is not possible to prevent jamming since it is integral to performance of the machine in making inoculators.

Puleo states she personally enforces safety when she walks the floor. For minor violations, an employee is given a verbal warning; if repeated, a written warning is given, which may subsequently lead to termination. Employer has terminated employees for violating the safety procedures, such as when an employee bypasses safety switches.

Puleo issued a final warning to Zakharnev following the incident in this case. (Exhibit C) Puleo stated that the written warning does not refer to Zakharnev clearing a jam because he was not doing that at the time of the accident.

According to Puleo, Employer also implements its safety policies and procedures through training conducted at the time of an employee's hire, and training by qualified maintenance personnel and engineers. Employees must review safety documents on a regular basis and must sign off on their review. Employees receive salary increases based on employee safety performance.

Puleo stated that when troubleshooting the inoculator machine, the operator needs to be able to observe the problem. If there is a need to "go in," then de-energizing guidelines must be followed to clear jams. Puleo stated that machine operators are the only employees to go near the machine during such procedure which also benefits the mechanics who may be called to address the problem.

On cross-examination, Puleo stated that, on Mondays, she arrives at work at 8:00 a.m. When asked who supervised Zakharnev from 6:00 a.m. to 8:00 a.m. on the day of the accident (on a Monday), she responded that he reported to no one during that time period but he could contact others, including her, by cell phone during that period. Puleo stated she does not sit and watch the machine operators during that period since they are the most experienced and longest working employees. She stated that there is a team for each machine consisting of 1 machine operator and 3 production associates and there are 2 rotating tables (inoculator machines) per shift. Zakharnev was a senior machine operator.

Puleo stated that Employer had a policy of withholding pay raises if an employee receives a written warning. Employer then changed its policy and now allows for a maximum of 1.5% pay, and following the incident in this case, Zakharnev did receive a raise of 1.5% which is still less than what he would have received if there was no written warning. Puleo stated that she discussed with Zakharnev his reduced raise and that he was aware that he would have received a larger raise but for the incident. Puleo stated that, overall, Zakharnev's job performance was very good.

Puleo testified that she was well aware of the jamming which occurred on the machine. Such occurrences were one reason for Employer's 15-minute rule which required that she be called if the problem was not resolved after 15 minutes. Employer is always searching for solutions for the problems and works regularly with engineers and the machine vendor.

When asked whether Employer had instructions for specific steps to lock-out the machine, Puleo conceded that Employer had a lock-out tag-out procedure for all its machinery but did not have a procedure specific to the inoculator machine. Puleo stated that there is no single step-by-step procedure for lock-out tag-out for any one piece of equipment only.

Puleo acknowledged that Zakharnev was responsible for insuring appropriate guarding of the machine if a guard was missing, and had the authority to stop the machine and instruct others to stop the machine. Puleo stated that Zakharnev required little supervision and that his team worked together well and were productive. She had no concerns regarding the sufficiency of this training, or any indication that he would put his hand in harm's way. Zakharnev was not responsible for supervising any other employees.

When asked whether employees are tested for their knowledge of lockout-tagout procedures as part of their training, Puleo replied in the negative and stated that although no written tests are given, employees sign-off for their training and there is a question and answer session at the end of trainings. According to Puleo, employees receive detailed training on lockout-tagout on an annual basis, and specifically, Zakharnev would have been presented with the procedures at such times.

Findings and Reasons for Decision

THE DIVISION ESTABLISHED BY A PREPONDERENCE OF EVIDENCE THAT EMPLOYER FAILED TO COMPLY WITH THE LOCKOUT-TAGOUT REQUIREMENTS UNDER §3314(c) DURING THE SERVICING OR ADJUSTING OF ITS INOCULATOR MACHINE.

EMPLOYER FAILED TO SATISFY ALL OF THE REQUIRED ELEMENTS FOR APPLICATION OF THE INDEPENDENT EMPLOYEE ACT DEFENSE.

THE PROPOSED CIVIL PENALTY BASED UPON A SERIOUS, ACCIDENT-RELATED VIOLATION OF §3314(c) IS AFFIRMED.

The Division has the burden of proving each element of its case including the applicability of the safety order cited, by a preponderance of the evidence. (*Cambrio Manufacturing Co.,* Cal/OSHA App. 84-923, DAR (Dec. 31, 1986); *Howard J. White*, Cal/OSHA App. 78-741, DAR (Jun. 16, 1983).)

Employer's Motion for Nonsuit

At the conclusion of the Division's case, Employer moved for nonsuit based upon the Division's failure to establish required elements for establishing a violation of §3314(c). Employer argued that the Division failed to establish, by a preponderance of the evidence, that Employer's employee was clearing a jam. Employer also argued that the Division's evidence showed that the machine must be capable of movement in order to diagnose the problem and prevent a jam. According to Employer, Employer complied with §3314(c)(1) since the machine was required to be moving and Zakharnev established Employer's use of other safety methods (only trained machine operators could operate the machine, extension tools were provided and used). Also, Employer argued that the evidence established that Zahkarnev was performing a minor adjustment of the machine during normal production operations and Employer used alternative measures which provided effective protection, and thus, met the requirements under Exception 1 of the safety order in that extension tools were provided, emergency buttons were placed on the machine, and only trained employees were allowed to operate the machine.

A motion for nonsuit is a recognized judicial procedure.[2] However, a summary disposition prior to the taking of all relevant evidence may not always further the purposes of the Board's role pursuant to its mandates or the purposes of the Act. Notably, the statutes and regulations addressing Board proceedings allow the Board to direct a hearing officer (administrative law judge): "[t]o *try the issues* in any proceeding before it, whether of fact or law, and make and file a finding, order, or decision based thereon (Labor Code §6604(a); [t]o hold hearings and *ascertain facts necessary* to enable the appeals board to determine any proceeding or to make any order or decision that the appeals board is authorized to make, or necessary for the information of the appeals board (Labor Code §6604(b)). Labor Code § 6608 states that "[t]he appeals board or a hearing officer shall, within 30 days after the case is submitted, make and file findings upon *all facts involved in the appeal* and file

[2] Generally, "a motion for nonsuit allows a defendant to test the sufficiency of the plaintiff's evidence before presenting his or her case. Because a successful nonsuit motion precludes submission of plaintiff's case to the jury, courts grant motions for nonsuit only under very limited circumstances." (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 838) "A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor. [Citation.] 'In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses.'" (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.)

an order or decision."[3]

Board regulations expressly provide that "the hearing need not be conducted according to technical relating to evidence and witnesses." (§376.2; see also, Government Code §11513(c)) Historically, rules of pleading and practice applicable to courts of record do not apply to administrative proceedings. (*Taylor v. Bureau of Private Investigators and Adjusters of Cal.*, (1954) 128 Cal.App.2d 219, 229) Nonsuit is not a procedure provided in the Appeals Board's regulations and the undersigned only found one case where the Board addressed an ALJ's grant of a nonsuit motion as a disposition of an appeal proceeding; however, the propriety of relief by nonsuit was not addressed. (*Structural Fireproofing, Inc.,* Cal/OSHA App. 76-1170, DAR (Jul. 20, 1978) [grant of nonsuit reversed based upon erroneous interpretation of safety order].)

In the absence of Board authority specifically addressing the propriety of entertaining and determining motions for nonsuit, it is appropriate to examine the law in other administrative contexts.

In administrative cases subject to the hearing provisions under §11500 et seq. of the Administrative Procedures Act, courts have recognized that a hearing officer in administrative proceedings may not entertain motions in the nature of demurrers to evidence or for nonsuit based upon want of evidence to make a prima facie case, but must proceed with the taking of all evidence until all of the testimony to be offered by all the parties have been received. (*O'Mara v. California State Board of Pharmacy* (1966) 246 Cal.App.2d 8, citing *inter alia*, *Frost v. State Personnel Board* (1961) 190 Cal.App.2d 1) In *O'Mara,* the court's analysis acknowledged that "[a]t the time the Board initially rested, it had not necessarily concluded its case in chief" relying on the language in Government Code §11513(b)—worded *exactly* as this Board's regulation in §376.1(b) which is quoted in footnote 3, supra). The rule in *Frost* thus appears to preclude motions for dismissal or nonsuit which are based upon a want of evidence.[4]

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[3] Additionally, regarding the conduct of a Board hearing, §376.1(b) states: "*Each party shall have these rights*: To call and examine witnesses; to introduce exhibits; to question opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examinations, to impeach any witness regardless of which party called the witness to testify; and to rebut any opposing evidence. If a party does not testify on his or her behalf, the party may be called and examined as if under cross-examination." (Italics added; see also Government Code §11513(b)) In a motion for nonsuit, the employer does not present any witnesses because the motion is made prior to that party presenting its case.

[4] The Appeals Board is authorized to promulgate its own rules of practice and procedure independent of the hearing provisions under the 11500 et seq. of the Administrative Procedures Act (See *Art's Trench Plate & K-Rail,* Cal/OSHA App. 01-3732, DAR (Oct. 10, 2003)). However, Labor Code §6603(a) requires that such rules adopted by the Board shall be consistent with select provisions of the APA, *including* Government Code §11513 which includes the same language in §376.1(b) quoted in footnote 5 above. The Board has noted that the evidence rules adopted by the Appeals Board are consistent with those applied under the Administrative Procedures Act and by other state agencies authorized by statute to conduct administrative hearings and that "[t]hese rules stress informality and a common-sense approach to determining evidence admissibility and use, circumscribed only by the limitation on the use of hearsay, and the adherence, as required, to the rules of privilege." (*West Valley Construction Company, Inc.*, Cal/OSHA App. 85-424, DAR (Nov. 2, 1987).) Thus, it is significant that some of the Board's rules are the

More recently, however, the Fifth District Court of Appeal (the same court which decided *Frost v. State Personnel Board, supra*) also acknowledged its rationale in *Frost* but underscored that its ruling there was based upon *prejudicial error* in entertaining and granting the dismissal motion based upon want of evidence. (*Duarte & Witting, Inc. v. New Motor Vehicle Board* (2002) 104 Cal.App.4th 626, 640). In *Duarte,* the court stated:

> We concluded [in *Frost*], "motions based upon want of evidence to make a prima facie case are not an authorized part of administrative procedure," but if such a motion is granted, the question will be whether the procedural error is prejudicial." [Bracketed material added]

In *Duarte*, the court held that "the purpose of the Board and the goal of administrative efficiency support a conclusion that the Board has the implied authority to dismiss a protest where the *undisputed facts* demonstrate good cause for franchise termination *as a matter of law* and afford no basis for preventing termination of the franchise." *Duarte & Witting, Inc. v. New Motor Vehicle Board, supra,* 104 Cal.App.4th at 637; italics added) The court analogized the dismissal motion to a summary judgment motion where the franchisor established good cause for termination as a matter of law, and the undisputed facts gave no viable basis to prevent termination of the franchise by the Board. The court reasoned that under such circumstance, "there would be no point of conducting an evidentiary hearing on issues of whether the dealer was performing its obligations under the franchise" and "that such an evidentiary hearing would simply entail the wasteful expenditure of public funds." (*Id.*)

The *Duarte* court, went further to discuss and distinguish the circumstances in the case from those in *Frost*, stating that the *Duarte* case did not raise the same concerns as *Frost* where the hearing officer weighed the evidence whereas a trial court could not weigh the evidence in passing on a motion for nonsuit. The *Duarte* court stated: "[i]n the case before us, there was no weighing of evidence and no need to weigh any evidence, because it was *undisputed* that [the car manufacturer] was ceasing to manufacture [the] vehicles…" The court again re-iterated the *Frost* ruling that a dismissal would not warrant reversal if it was harmless (i.e., non-prejudicial) (*Id.,* at 641)

From a close reading of the above cases, summary dispositions without a full evidentiary hearing may be authorized where (1) the material facts are undisputed (2) the requested relief is appropriate as a matter of law, and (3) no prejudicial error is evident.

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same as those under the APA, and thus, cases interpreting or applying the similar APA provisions have some significance to the interpretation of Board rules on the same subject.

Employer's motion for nonsuit in the instant case is based upon the sufficiency of the evidence to establish a prima facie case of a violation of §3314(c) and is not amenable to summary disposition as contemplated and approved in *Duarte*. Rather, Employer's nonsuit motion more squarely falls under the circumstances in *Frost* and *O'Mara* which found the error prejudicial where the hearing officer's summary disposition precluded the presentation of all relevant evidence and examination of all witnesses regarding the issues given the rights of the parties to do so (§376.1(b)) and where only some of evidence is presented and some of the witnesses are heard. Here, there was *a factual dispute* regarding whether the specific activity Zakharnev was performing prior to his accident was unjamming the machine. Rather than allowing for a judicially efficient disposition on undisputed facts, allowing partial presentation of evidence to render a disposition of the case by nonsuit would contravene the language in §376.2(b) and Labor Code §§ 6604 and 6608 which provide for a full presentation of evidence and witnesses and trial of all issues of fact (where disputed) and law and that findings be based upon all of the facts presented at a hearing.[5]

Because the nature of Employer's nonsuit was based upon the *sufficiency of the evidence* without affording each party the rights to present all evidence and examine all witnesses (§376.1(b)), the motion is denied as an inappropriate summary disposition of the case.[6] The same issues raised on the motion are addressed and resolved in the following analysis.

The Evidence Established a Violation of §3314(c)

Section 3314 is contained in Article 7 – Miscellaneous Safe Practices of the General Industry Safety Orders and states:

> (c) Cleaning, Servicing and Adjusting Operations. Machinery or equipment capable of movement shall be stopped and the power source de-energized or disengaged, and, if necessary, the moveable parts shall be mechanically blocked or locked out to prevent inadvertent movement, or release of stored energy during cleaning, servicing and adjusting operations. Accident prevention signs or tags or

[5] The nonsuit motion also reflects a limited view of the Division's burden of proof. The Division's burden of proof by a preponderance of the evidence is not limited to the evidence presented by the Division. "…'[P]reponderance of the evidence' is usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. … Full consideration is to be given to the negative and affirmative inferences to be drawn from *all the evidence, including that which has been produced by defendant*. (*Lone Pine Nurseries,* Cal/OSHA App. 00-2817, DAR (Oct. 30, 2001) [italics added for emphasis], citing *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483, review denied).)

[6] Since the denial of Employer's motion for nonsuit is based on the *impropriety* of the nonsuit motion, it is not necessary to rule on the sufficiency of the Division's evidence at the time it initially rested its case.

> both shall be placed on the controls of the power source of the machinery or equipment.
>
> > (1) If the machinery or equipment must be capable of movement during this period in order to perform the specific task, the employer shall minimize the hazard by providing and requiring the use of extension tools (e.g., extended swabs, brushes, scrapers) or other methods or means to protect employees from injury due to such movement. Employees shall be made familiar with the safe use and maintenance of such tools, methods or means, by thorough training.

Under §3314, "cleaning, servicing and adjusting" activities shall include unjamming prime movers, machinery or equipment." (§3314(a)(2).) "Locked out" is specially defined as "the use of devices, positive methods and procedures, which will result in the effective isolation or securing of prime movers, machinery and equipment from mechanical, hydraulic, pneumatic, chemical, electrical, thermal or other hazardous energy sources." (§3314(b) Definitions)

In 2004, the Standards Board amended §3314 (operative January 6, 2005) to re-organize and modify the control of hazardous energy addressed by the safety order. The current language in subdivision (c) is substantially similar to the previous subdivision (a).[7] In interpreting the similar prior version of the safety order, the Board has stated that "[t]he clear purpose of section 3314(a) is to keep employees away from the danger zone created by moving machinery." (*Stockton Steel Corporation,* Cal/OSHA App. 00-2157, DAR (Aug. 28, 2002).) The Board has interpreted the operative language in the safety order as follows:

> [The] Section … imposes two primary safety requirements prior to cleaning, adjusting and servicing machinery: (1) machine parts capable of movement must be stopped, and (2) the power source must either be de-energized or disengaged. If the two primary requirements are not effective to prevent inadvertent movement, another requirement applies—the parts capable of movement must be mechanically blocked or locked in place. *Rialto Concrete*

[7] The previous language in §3314(a) stated: Machinery or equipment capable of movement shall be stopped and the power source de-energized or disengaged, and, if necessary, the moveable parts shall be mechanically blocked or locked out to prevent inadvertent movement during cleaning, servicing or adjusting operations unless the machinery or equipment must be capable of movement during this period in order to perform the specific task. If so, the employer shall minimize the hazard of movement by providing and requiring the use of extension tools e.g., extended swabs, brushes, scrapers) or other methods or means to protect employees from injury due to such movement. Employees shall be made familiar with the safe use and maintenance of such tools by thorough training. For the purposes of Section 3314, cleaning, repairing, servicing and adjusting activities shall include unjamming prime movers, machinery and equipment.

Products, Inc., Cal/OSHA App. 98-413, DAR (Nov. 27, 2001), citing *Maaco Constructors, Inc.,* Cal/OSHA App. 91-674, DAR May 27, 1993).)[8]

The current version of the safety order also requires that accident prevention signs or tags shall be placed on the controls of the power source of the machinery or equipment.

In this case, there was a dispute over whether the activities performed by Zakharnev were covered by the safety order. Specifically, Employer disputed whether Zakharnev was "unjamming" the machine at the time of the accident.

The Board has previously looked to the specific task being performed in the context of the assignment which gave rise to it. (*Lights of America,* Cal/OSHA App. 89-400, DAR (Feb. 19, 1991).) Thus, even where an employee was not performing work on the machine or its parts at the moment he was injured, the activity is covered if he was doing a necessary part of a covered activity. (*Id.*) Also, the Board overruled cases which previously interpreted the safety order as excluding service work during normal operations (e.g., clearing a jam)[9] as well as cases which required the physical working on, or altering of, a machine as a precondition to that work being considered "cleaning, servicing, or adjusting" under §3314. (*Sacramento Bag Mfg., Co.,* Cal/OSHA App. 91-320, DAR (Dec. 11, 1992).) The Board has recognized that "[i]t is always dangerous to work around energized machinery" and "[t]his danger is present however the activity around the energized machine is characterized." (*Stockton Steel Corporation,* supra, citing *Tri-Valley Growers,* Cal/OSHA App. 93-1971, DAR (Sep. 12, 1994).)

The Board has rejected the interpretation of "servicing" within the meaning of §3314 as being limited to routine or minor service work stating that the term "may have many purposes other than preventing damage to machinery or equipment." (*Machine Trade Center,* Cal/OSHA App. 00-3244, DAR (Jun. 3, 2002).) Servicing activities may be taken to prevent an interruption of production by replacing a part before it fails or to enhance or maintain satisfactory functioning of a machine or piece of equipment, either in terms of quantity or quality of product or to avoid some undesirable effect. (*Id.,* citing *United States Pipe and Foundry Company, Inc.,* Cal/OSHA App. 98-1130, DAR (Jun. 29, 2001).)

Here, Zakharnev was addressing jamming problems on the inoculator machine which began following the start up of the machine on Monday morning. Jams occur frequently and are integral to the performance of the machine. That machine's high output requires many adjustments in

[8] In *Simpson Timber Company,* Cal/OSHA App. 77-1038, DAR (Jun. 9, 1980), the Board expressly rejected a restrictive interpretation of the safety order as being only concerned with inadvertent movement caused by people. The Board held that "inadvertent movement is any movement which is not intended."

[9] As indicated above, the safety order expressly provides that unjamming a primary movers, machinery or equipment is an included activity.

machinery components and materials. Because of the many on-going adjustments, and the varying contributing factors (temperature, weld timing, weld current, and the wearing of parts), the jamming problems do not have a permanent fix. Zakharnev's duty was to discover and fix the inoculators machine when it jammed and he was attempting to perform these duties when the accident happened.

In view of the above, the undersigned finds that Zakharnev was performing an activity of servicing the machine in that he was diagnosing and troubleshooting the jamming problem at the air test station of the rotary machine. Although Zakharnev was not performing work on the machine or its parts at the moment he was injured after he tapped the nest tray in cavity #1 with his fingers, in the context of his duties and actions, he was performing an activity which necessarily addressed a recurring jamming problem, and thus, constituted servicing or adjusting of the machine under §3314(c).

Regarding the existence of a violation of the cited safety order, the evidence established that the machine was in operation at the time of the accident and the parts capable of movement (the rotary table and pedestal at the cutter station) were not stopped; nor was the power source de-energizerd and moveable parts mechanically blocked or locked out. Zakharnev admitted that he did not follow Employer's procedures at the time of the accident which is further supplemented by Stamatellos' hearsay testimony that Zak had told him that he did not use a lockout-tagout procedure. The fact that the powered pedestal under the rotary table of the inoculator machine moved upwards further shows that a moveable part to which Zak was exposed while performing a servicing activity was not de-energized.

There was evidence presented via the testimonies of Zak and Puleo asserting that the inoculator machine needed to be running which potentially invokes the possible application of §3314(c)(1) which qualifies the requirements in §3314(c) where machinery or equipment *must be capable of movement* in order to perform the specific task. When read in context, the provisions in (c)(1) must be viewed as an exception to the general provisions in (c) since the language in the former is inconsistent with the requirements in the latter. Also, the language in (c)(1) requires alternative safety measures such as the use of extension tools or other methods or means to protect employees from injury due to movement of the machinery or equipment in addition to thorough training of employees.[10]

An exception to the requirements of a safety order is in the nature of an affirmative defense, which the employer has the burden of raising and proving at the hearing. (*Kaiser Steel Corporation*, OSHAB 75-1135, DAR (June 21,

[10] Prior to the 2004 amendment to §3314 which re-organized and modified the safety, the language in current 3314(c)(1) was included in the main part of the previous §3314(a). (See footnote 2, supra.) The Board previously interpreted the similar language to constitute an exception to the general requirement to which the Employer bears the burden of proving the elements of the exception. (*Sacramento Bag Manufacturing Co.,* Cal/OSHA App. 91-320, DAR (Dec. 11, 1992).)

1982); *Roof Structures, Inc.*, OSHAB 81-357, DAR (Feb. 24, 1983); and *The Koll Company*, OSHAB 79-1147, DAR (May 27, 1983).) Here, Employer did not raise §3314(c)(1) as a defense or otherwise allege facts in its appeal form providing notice that it would seek to raise the alternative provisions as applicable when the machine is required to be running. [11]

Additionally, Employer maintains that Exception 1 to the application of §3314(c) applies in this cases. Section 3314 also provides:

> Exceptions to subsections (c) and (d):
>
> 1. Minor tool changes and adjustments, and other minor servicing activities, which take place during normal production operations are not covered by the requirements of section 3314 if they are routine, repetitive, and integral to the use of the equipment or machinery for production, provided that the work is performed using alternative measures which provide effective protection.

As previous stated, an exception to the requirements of a safety order is in the nature of an affirmative defense, which the employer has the burden of raising and proving at the hearing.[12] (*Kaiser Steel Corporation*, supra; *Roof Structures, Inc.*, supra; and *The Koll Company*, OSHAB 79-1147, DAR (May 27, 1983).)]

Employer asserts that evidence establishes that the task performed by Z at the time of the accident was a minor servicing activity under the above exception and that Employer provided alternative measures which provided

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[11] Even if properly raised, the provisions of §3314(c)(1) would not apply assuming that the inoculator machine had to be in operation (running) in order to perform the specific task. Zak admitted that he could have but *did not use an extension tool* in order to tap the tray that was askew. He also stated that an extension tool was provided and available for use, could be used to clear jams in areas not accessible by hand, and he was trained how to use what he described as a large screwdriver type tool approximately 2 feet long which had a variety of uses. Zak also stated he used the extension tool at the cutter station that morning in order to remove plastic parts. Employer presented documentary evidence regarding various training Z received (Exhibit B), including a written safety provision for the inoculator machine (Exhibit D). The documents do not specify or address training regarding the use of extension tools. Other than Zak's summary statement that he was trained in the use of the extension tool, there is no other evidence which explains the level of such training in order to ascertain whether the employee was "thoroughly trained" as required in the safety order. A summary statement that the employee was trained in the use of such tool does not establish that he was "thoroughly" trained in the specific uses of extension tools for purposes of actually providing effective protection against moving machinery while performing cleaning, servicing, and adjusting operations. Additionally, the undisputed evidence establishes that Employer provided an extension tool; however, it was not sufficiently established that such tool was to be used in performing the servicing task being performed at the time of the accident. More specific evidence demonstrating the specific training regarding the use of extension tools is required in order for Employer to qualify for the alternative provisions in §3314(c)(1).

[12] In its appeal form, although Employer did not specifically state Exception 1 as an affirmative defense, it asserted several facts regarding various measures taken to address the hazard. The undersigned reads such facts, given in response to the cited safety order, as sufficiently raising Exception 1 to 3314(c) which addresses alternative measures to provide effective protection.

effective protection. Specifically, the testimonies of Zak and Puleo established that extension tools, extensive safety training, instructions to not put hands in harm's way, and emergency stop buttons were provided and constituted effective alternative measures.

However, as discussed above in footnote 11, insufficient evidence regarding the specific training on the use of extension tools was presented. The undisputed facts that Zakharnev was a long-time, experienced employee who was trained in the use of extension tools is insufficient to demonstrate that he was trained in the use of such tools for the particular task he was performing on the morning of his accident. Conclusory statements regarding elements of a safety order or an exception thereto, do not sufficiently demonstrate to the undersigned that the proposed alternative measures are *effective* without further specific evidence demonstrating that such measures rise to a level which justifies freedom from the general protective provisions in §3314(c). Exceptions are to be strictly construed in order to justify a freedom from the general rule.

Similarly, instructions to employees to not put their hands in harm's way and providing emergency stop buttons are certainly laudable safety measures for working around any moving machinery or equipment. The most specific testimony regarding Zakharnev's actual use of extension tools was that such tools were to be used when he could not reach the area by hand. However, without specific evidence showing how such measures constitute effective protection for performing an assigned task covered under §3314(c), an employer cannot be deemed to have effective alternative measures upon summary representations.

Thus, even assuming that the activity Zakharnev performed was minor servicing, Employer failed to carry its burden to establish the applicability of Exception 1 by showing that the measures taken were effective in providing protection to employees performing such minor servicing.

Based upon the foregoing, including the failure of Employer to establish the application of the exception discussed above to the requirements of the lockout-tagout requirements in §3314(c), a violation of the safety order was established by a preponderance of the evidence.

Independent Employee Act Defense

Employer also raised the independent employee action defense (IEAD). "The IEAD is a Board-developed affirmative defense to the existence of a violation that applies when an employee acts against the best safety efforts of the employer in causing a violation. The defense recognizes that in spite of an employer complying with safety requirements and promoting safety to employees through an effective and enforced safety program, an employee, by affirmative act or omission, may still disregard the established safety measures." (*Columbia Helicopters, Inc.*, Cal/OSHA App. 01-623, DAR (Jan. 8,

2004).) Because it is an affirmative defense, the burden of proving it, to a preponderance of the evidence rests upon the employer. The defense is premised upon an employer's compliance with non-delegable statutory and regulatory duties. (*Id.; Pierce Enterprises*, Cal/OSHAApp. 00-1951, DAR (Mar. 20, 2002).)

To prevail on the defense, the employer must establish all of the following elements: (1) that the injured employee had experience in the job being performed; (2) that it had a well devised safety program; (3) that it effectively enforced the safety program; (4) that it had a policy of applying sanctions for violations; and (5) that the employee causing the infraction knew he was acting contra to the employer's safety requirement. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, DAR (Oct. 16, 1980).)

Regarding the first element, the evidence was not controverted that Zak was very experienced in the operation of the inoculator machine. He was a regular machine operator for approximately 2 years before he was promoted to a senior machine operator which he work approximately 5 years. Both Zak and Puleo testified that only one machine operator works on a single machine, and due to the complexity of the machine and its operation, and the job duties of senior machine operators, proficient knowledge of the equipment and procedures were required in order to address the "medium to complex troubleshooting of any problems with production equipment encountered during his shift." (Exhibit A, p. 2) Accordingly, the first element was satisfied.

Regarding the second element that Employer had a well-devised safety program, the record shows that Employer makes safety a high priority, administers its safety requirements through regular safety meetings and trainings, and quarterly safety assessments. Employer documented its training efforts and required reading (subscriptions) regarding written procedures for operation of machinery and safety, including Zakharnev's extensive training (Exhibit B). Employer's safety program appears to be extensive and comprehensive. However, Puleo testified that Employer did not have a *specific* lock-out tag out procedure for the inoculator machine which is a specific requirement under §3314(g)(2)(A).[13] Although Employer was not cited for its failure to have an effective lockout-tagout procedure or an energy control procedure for its inoculator machine, the fact it does not have one is nevertheless relevant to determining whether Employer has a well-devised safety program for purposes of evaluating the independent employee act defense.

Puleo admitted that Employer has a lock-out tag-out procedure which covers *all* its machinery but there was no single step-by step procedure for a

[13] The subsection requires "separate procedural steps for the safe lockout/tagout of each machine or piece of equipment affected by the hazardous energy control procedure."

single piece of equipment.[14] Such deficiency is remarkable given the plethora of evidence establishing the particular complexity of the machine which has 8-9 stations performing different steps in producing inoculators and the well known jamming problems which occur routinely. Indeed, Zakharnev stated that machine operators are there because of the well-known jamming which occurs on the inoculator machine; and further he stated that the type of jam he was addressing the morning of the accident had occurred both before and after that day.

As previously stated, the defense is *premised* on an employer's *compliance* with non-delegable statutory and regulatory duties. The defense recognizes that in spite of an employer complying with safety requirements and promoting safety, an employee may still act against the best safety efforts of the employer. Section 3314(c) refers to machinery and equipment in the singular tense and the energy control procedures required in §3314(g) require "*separate* procedural steps for the safe lockout/tagout of *each* machine or piece of equipment affected by the hazardous energy control procedure" (§3314(g)(2)(A)) which may only be made applicable for a group or type of machinery under specified conditions. The absence of a lockout/tagout procedure specific to the inoculator machine is a material deficiency in Employer's safety program given the well-established frequent jamming problems on the machine which exposes the machine operator to the hazards of moving machinery. The evidence also established that machine operators, given their experience and expertise, have significant authority and discretion to determine how to troubleshoot problems with operation of the machine. Such authority and discretion, however, cannot constitute a delegation of Employer's duty to comply with effective energy control procedure for the machine to insure that an employee's practices are in compliance with legal requirements.[15] Accordingly, Employer failed to establish the second element of the defense.

The third element—that Employer effectively enforced its safety program, requires that evidence of meaningful enforcement of a well-devised safety program must be presented. (*Tri-Valley Growers*, Cal/OSHA App. 94-3355, DAR (Sept. 15, 1999).) The Board has stated that "[a]n essential ingredient of effective enforcement is provision of that level of supervision reasonably necessary to detect and correct hazardous conditions and practices." (*City of Los Angeles Department of Water & Power*, Cal/OSHA App. 86-349, DAR (Apr. 4, 1988).)

Here, the evidence presented demonstrates that Employer satisfied the third element since there was evidence that Employer generally enforced its

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[14] The documentary evidence *refers* to a writing for a "Lockout/Tagout Program" (SOP #028-015) regarding Zakharnev's training in 3/30/05 and 2/20/02 (Exhibit B) and in the "Findings" section of Employer's accident report (Exhibit 6); however, the written program was not presented at the hearing.

[15] For example, Zakharnev stated that he would use the extension tool to access an area he could not reach and did not specify what other situations required the use of extension tools. A specific lockout/tagout procedure for the inoculator machine which specifies the conditions for

safety program, assigned Puleo to walk the floors, ensured training of employees, imposed progressive disciplinary procedures, conducted periodic safety audits (assessments), and ensured that only the most experienced operators worked in the inoculator machine.[16] Accordingly, the level of supervision reasonably necessary to detect and correct hazardous conditions on the machine does not require a level of constant supervision under the circumstances in this case.

Regarding the fourth element (a policy that provides for sanctions for violations of the safety program), Employer satisfied this element. Puleo testified that Employer in fact disciplined and terminated employees for past violations of its safety policies and procedures, and further, imposed the policy in response to the subject incident in this case.

Lastly, the evidence failed to establish that Zakharnev *knew* he was acting against the employer's safety requirement required under the fifth element. Zakharnev acknowledged that he violated the company's policies in putting his hand in harm's way (underneath the rotary table at the air test station) when the machine was operating. His testimony perhaps demonstrates his general knowledge of Employer's requirement of not putting one's hand in harm's way when the machine is in operation. However, there is insufficient evidence establishing his knowledge of the specific circumstances for following a lockout-tagout procedure, or for invoking alternative procedures for performing the task when the machine must be running. Under the circumstances in this case, knowledge of the distinction is critical in order for Employer to satisfy the employee knowledge element requiring that an employee know when to follow a lockout-tagout procedure for which Employer is cited. The absence of evidence specifically demonstrating Zakharnev's knowledge in this regard also relates to the material deficiency in Employer's well-devised safety program as discussed above regarding the second element of the IEAD. Obviously, Employer's acknowledged failure to have a lockout-tagout procedure *specific* to the inoculator machine would not support a finding of employee knowledge--thus, evidence of Zakharnev's actual knowledge of *specific* procedures for given circumstances in addressing jamming problems on the jam-prone machine was required. Zakharnev's summary testimony that he was trained in lockout-tagout procedures begs the question of his knowledge regarding when to use such procedures (especially given the absence of a machine specific lockout-tagout procured for the

[16] The Division suggested that Zakharnev had sufficient authority over the crew of production associates to constitute a responsible person for the Employer which would preclude application of the IEAD. The Appeals Board has long held that the defense of independent employee act is not available in those situations where a foreman or supervisor commits the safety violation. (See City of Sacramento, Dept. of Public Works, Cal-OSHA App. 93-1947, Decision After Reconsideration (Feb. 5, 1998), citing *Davey Tree Surgery Co. v. Occupational Safety & Health Appeals Board* (1985) 167 Cal.App.3d 1232.) The undersigned finds that there was insufficient evidence to find that Zakharnev had responsibility over the production associates. To the contrary, Zakharnev stated he had no supervisory responsibility over the other employees and they had a different job function regarding the finished products. Thus, Employer is not precluded from application of the IEAD on grounds he was a supervisor.

machine) and does not sufficiently demonstrate that he knew of specific steps to follow in order to address jams *on the subject machine*. Thus, the record does not support a finding that Zakharnev's knew when to invoke lockout-tagout procedures in addressing jamming problems on the inoculator machine.

Since Employer failed to establish the second and fifth elements of the independent employee act defense as discussed above, it may not avoid responsibility for the violation of §3314(c)

Employer did not contest the classification or penalty amount in the citation, and thus, the serious violation and the penalty amount of $22,500 is established as a matter of law.

Decision

Employer's appeal of Citation 1, Item 1 is denied and the proposed penalty is affirmed, as set forth above and in the attached Summary Table.

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Robert N. Villalovos
Administrative Law Judge

DATED: March 16, 2007
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